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Nos. 94-1614, 94-1631 and 94-1965

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN, PETITIONER

v.

CITY OF NEW YORK, ET AL.

STATE OF OKLAHOMA, PETITIONER

v.

CITY OF NEW YORK, ET AL.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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REPLY BRIEF FOR THE FEDERAL PETITIONERS

Respondents concede (Br. 66-67) that in conducting the 1990 census, the Census Bureau made a "good-faith

effort" to achieve both "the most accurate count practicable" and "population equality." Respondents nevertheless contend that the Secretary of Commerce violated the Constitution when he declined to make a statistical adjustment of the census totals. As we explain in our opening brief (at 26-28), however, because the Constitution provides that the decennial census shall be made "in such Manner as they [the Congress] shall by Law direct," Art. I, § 2, Cl. 3—and because Congress in turn has assigned to the Secretary the responsibility for conducting the census "in such form and content as he may determine," 13 U.S.C. 141(a)—there is no basis for a court to compel revision of a census that was reasonably calculated to enumerate the Nation's population within a fair range of accuracy and that in fact counted 98.4% of the people. In particular, because respondents acknowledge that the census headcount was conducted in good faith, they have wholly failed to make the threshold showing that would be required under *Karcher* v. *Daggett*, 462 U.S. 725 (1983), to trigger heightened scrutiny of the Secretary's decision not to publish *other*, statistically adjusted population totals. See U.S. Br. 41. Thus, even assuming that the court of appeals correctly imported the *Karcher* framework into this quite different setting (but see U.S. Br. 39-40 & n.30) respondents' constitutional claim is without merit (see *id.* at 39-45).

In light of the fundamental soundness of the census itself, resolution of this case does not require a detailed analysis of respondents' various technical disagreements with the Secretary's judgment that a statistical adjustment was unwarranted. In any event, respondents' arguments lack merit. Respondents suggest that experts uniformly favored a statistical adjustment to the 1990 census and that the Secretary disregarded that consensus. In fact, numerous statistical experts, both inside and outside

the government, concluded that the proposed adjustment was not warranted, and many who supported adjustment recognized that reasonable statisticians could disagree. The Secretary's decision was based on a thorough and reasoned analysis of the competing views. The Secretary is charged by statute with conducting the census, and it is his decision—including his determination that the superior accuracy of the adjusted 1990 census figures had not been proved—to which the courts must defer. Respondents' invocation of the Constitution does not diminish the deference owed to that decision.

A. Respondents' principal argument (Br. 58) is that "'technical expertise' with respect to the census rests within the Bureau," and that "[t]he Secretary's decision, without contributions from nor review by the expert Bureau, was made in derogation of that technical expertise." Those contentions mischaracterize the record.

1. First, no expert consensus existed as to the advisability of adjusting the census: there was substantial disagreement on the issue within the professional community,[1] and the Secretary had access to a number of experts who were not persuaded that adjustment would improve the distributive accuracy of the census.[2] Within

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[1] Indeed, questions concerning the feasibility of adjustment had been raised from the outset. A March 3, 1988, letter sent by 11 professors of statistics and two professors of mathematics to the House Subcommittee on Census and Population stated that "[s]o far, the technical case for adjustment is weak." DX 89, at 2. The letter stated that "adjustment can easily introduce more mistakes than it fixes," and warned that "[o]ne egregious tactic" employed by some adjustment proponents "is to assert that there is a consensus of technical opinion favoring adjustment." *Id.* at 1, 2.

[2] Respondents give a highly one-sided account of the post-enumeration survey and the adjustment process. Thus, respondents downplay the significance (and problematic nature) of the "homo-

the Census Bureau, Peter Bounpane and Charles Jones had a combined 57 years' experience in the planning and

geneity assumption" (see U.S. Br. 12-13), contending (Br. 19) that "[t]he assumption [behind post-stratification] was not that [individuals within a post-stratum] would share exactly the same [capture] probability, but rather that [they] would be more similar to one another (with respect to their likelihood of being counted in the census) than to individuals in other post-strata." Respondents' expert agreed at trial, however, with the statement that "[t]here is a further assumption that within each poststratum the probability of capture in the census is the same for all persons." Tr. 1658 (Dr. Stephen Fienberg).

Respondents also assert that "[t]he [post-strata] categories selected were the ones the Bureau had determined in its own research and in its review of research by other specialists to provide the greatest explanatory power in analyzing differences in undercount rates." Resp. Br. 18 (citing Tr. 513-514). The cited transcript pages do not support that proposition, and in fact there was substantial dispute as to whether the combination of variables chosen actually corrected the differential undercount in a way that made the adjusted numbers more accurate. In selecting geographic groupings for post-strata, for example, the Bureau simply employed its pre-existing census divisions. See Pet. App. 373. Dr. Wachter analyzed the results of an experimental re-poststratification, in which all demographic and place-type divisions of post-strata remained the same, but new (and more homogeneous) post-strata were defined by changing the state groupings. Tr. 2133; DX 44. The differences resulting from that experiment were substantial. Tr. 2138-2139; DX 44. In Dr. Wachter's view, those analyses demonstrated that adjustment fails the test imposed by Guideline Three that adjusted counts be robust to reasonable alternatives. Tr. 2142.

Respondents also state (Br. 29) that the Bureau's P-projects "showed that each of the measurable sources of error had been controlled, leaving survey results that could reliably be used to adjust"; but the Secretary explained in detail his disagreement with that conclusion. See Pet. App. 205-213; see also DX 1, at 902 (minority on Undercount Steering Committee was "concerned that the evaluation studies understate the level of error"); Tr. 2112-2125, 2156, 2175. And respondents make no reference to the smoothing and pre-smoothing processes and the uncertainties they introduced (see U.S. Br. 9-12).

evaluation of the census, and each had substantial statistical expertise. See DX 1, at 919, 923; Tr. 1719-1723, 1889-1890. As members of the Undercount Steering Committee, they disagreed with the Committee majority's conclusion that adjustment would improve the accuracy of the census, on the ground that "reasonably complete analyses of results have yet to be performed." DX 1, at 898.[3] The Secretary was also assisted by other statistical experts within the Commerce Department. The recommendation against adjustment of Under Secretary Dr. Michael Darby, Ph.D., was issued as Appendix Six to the Secretary's decision. See DX 1, at 965 *et seq.*[4]

[3] Respondents state (Br. 34) that "seven of the nine members of the Undercount Steering Committee concluded that the adjusted counts were more accurate than the unadjusted and that the census should be corrected on the basis of the PES." In fact, although the Committee majority "conclude[d] that a statistical adjustment of the 1990 census leads to an improvement in the counts," DX 1, at 898, it made no recommendation concerning an adjustment. One member explained that the Committee did not make a recommendation because "the Census Bureau is a statistical agency" and the ultimate decision whether to adjust "includes other issues as well; legal policy and so on." Tr. 1767. Respondents also state (Br. 34) that the two dissenting members of the Committee "joined in the conclusion that adjustment would be proper for [certain] purposes and groups." The Committee's report stated that the dissenting members "would support the use of adjusted counts in the *intercensal* estimates program, and they believe that an alternative adjustment using the PES data to adjust for post-strata with large measured undercounts *might* be acceptable to them." DX 1, at 898 (emphasis added). The propriety of an intercensal adjustment (which would not affect representation) is not at issue in this case; and the possibility of an acceptable alternative adjustment could be of little relevance to the Secretary's decision, in light of the July 15, 1991, deadline and the pre-specification requirement (see U.S. Br. 6, 18 n.15).

[4] Under Secretary Darby had previously discovered a significant error in the Bureau's methodology, necessitating a correction that

Deputy Under Secretary Dr. Mark Plant, Ph.D., similarly concluded that adjustment "would not increase the accuracy of the census." Plant Dep., Vol. 2, at 19; see also *id.* at 23-24, 315. The Secretary also gave careful attention to the individual recommendations of the eight members of the Special Advisory Panel, four of whom advised against adjustment. See Pet. App. 258-319.[5] In short, there simply was "no consensus among statisticians and demographers that [adjustment] would make the state and district census totals—the level at which the adjustment would actually affect representation and funding—more accurate." *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1413 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992).[6]

2. Nor did the Secretary fail to consider the views of those who favored adjustment. After the Undercount Steering Committee prepared its majority and minority

substantially affected the Bureau's analysis. Tr. 1956-1957; See page 8, *infra*.

[5] Respondents contend (Br. 36-37, 38 n.18) that the four members of the Special Advisory Panel who recommended against adjustment were opposed to adjustment from the time of their appointment, and that "the Secretary failed to explain why a deadlock that was preordained had any bearing on the merits of his decision." The first contention is factually unsupported. See Tr. 2292 (Dr. Wachter testified that at the time of his nomination to the Panel he was "skeptical that adjustment could work" but that he "came to the position, let's * * * see how it all goes out, what will the data show"). And the Secretary did not simply rely on the *fact* of disagreement among the Panel members; he evaluated the competing views, and explained in considerable detail his reasons for finding some members more credible than others. Pet. App. 258-319.

[6] Since the Seventh Circuit's decision in *Tucker*, the scholarly debate has continued. See, *e.g.*, 9 Stat. Sci. 458-537 (1994) (compilation of papers and rejoinders); *Adjusting the Census of 1990: An Exchange*, 34 Jurimetrics J. 59-115 (1993) (compilation of articles).

reports, the Secretary met personally with proponents of both positions within the Census Bureau. DX 75; Tr. 1769-1770, 1908-1909. In his final decision, the Secretary described in extensive detail the adjustment methodology chosen by the Bureau and the arguments in favor of adjustment advanced by Bureau officials and some members of the Special Advisory Panel. Even Bureau officials supporting adjustment acknowledged that the issue was not clear-cut. Thus, Census Bureau Director Barbara Bryant prefaced her recommendation with the observation that "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." J.A. 73. Senior Mathematician Robert Fay similarly supported adjustment but told the Secretary that "reasonable statisticians could differ on this conclusion." Tr. 1909.[7]

[7] Based on subsequent research, Dr. Fay testified at trial that he no longer advocated the adjustment proposed for the Secretary's consideration in July 1991. Tr. 1920-1921; see U.S. Br. 38. Respondents characterize (Br. 43 n.20) Dr. Fay's testimony as asserting "that, after an additional year of research, he believed other adjustments of greater accuracy could be made." That is not what Dr. Fay said. He testified that he had not made up his mind whether he would favor an adjustment of the 1990 census figures. Tr. 1921. Dr. Fay explained that the Census Bureau's CAPE Committee (see U.S. Br. 4-5) was continuing to consider the question whether a statistical adjustment should be used in computing intercensal population estimates, and that the Committee was "looking earnestly at whether alternative adjustments of the census, avoiding the problems that I have described in my [research] paper, might produce an acceptable means of accounting for undercount as we produce post censal estimates." Tr. 1921. Census Bureau Director Bryant subsequently decided against adjustment of the intercensal figures. 58 Fed. Reg. 70 (1993). In any event, Dr. Fay's willingness (in May 1992) to hold out the possibility that an acceptable adjustment methodology might be devised in the future scarcely casts doubt upon the Secretary's July 1991 decision.

Respondents' contention that the Secretary rejected a settled expert consensus is particularly unpersuasive in light of the uncertain state of the record at the time the Secretary was required to act. The Undercount Steering Committee's June 21, 1991, report estimated that the proportional shares of 11 States would be made worse by adjustment. The loss function on which that estimate was based failed to account, however, for the variability of the estimates created by the smoothing and pre-smoothing processes (see U.S. Br. 9-12), a fact pointed out first by Commerce Department Under Secretary Darby. Tr. 1956-1957; see note 4, *supra*. When that omission was brought to the Bureau's attention, it conducted a second loss function analysis. This time, the Bureau concluded that the proportional shares of 21 States would be made less accurate by adjustment, and that two-thirds of the population resided in States whose shares would be made more accurate. DX 1, at 913; J.A. 81. That conclusion was communicated to the Secretary in an Addendum issued on June 27, 1991, and in Census Bureau Director Bryant's recommendation issued the following day—less than three weeks before the Secretary was required by the stipulation to announce his decision for or against adjustment. See Pet. App. 190; J.A. 70, 81. The Addendum stated that "the overall committee position has not changed regarding adjustment, but has been weakened somewhat." DX 1, at 916. The Addendum also noted that "[w]hen additional information * * * becomes available, the committee acknowledges that it may strengthen or weaken its conclusions." *Ibid.*

The Secretary viewed the revised loss function analysis as still skewed toward adjustment, however, because the variances it used had been understated (by the Undercount Steering Committee's own estimation) by a factor in the range from 1.7 to 3. He determined that, if

the variances were increased by a factor of 2, a figure at the low end of the Bureau's range, "the proportional shares of about 28 or 29 states would be worsened by an adjustment in terms of distributive accuracy." Pet. App. 191. The Secretary reasonably concluded that "[t]here is certainly not sufficient evidence to reject the distributive accuracy of the census counts in favor of the adjusted counts." *Id.* at 201. He also noted that he was "deeply concerned that if an adjustment [wa]s made, it would be made on the basis of research conclusions that may very well be reversed in the next several months." *Id.* at 248. That concern proved to be warranted. Subsequent research demonstrated that errors (including a computer coding error) had led to a significant overestimation of the net national undercount, with potential consequences for the apportionment of Representatives among the States. See U.S. Br. 4-5, 18-19.[8]

3. Respondents err in suggesting (Br. 58-60 & 61 n.25) that Secretary Mosbacher's lack of statistical training

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[8] If the corrected adjusted figures were used for a reapportionment, Wisconsin would lose a Representative and California would gain one, but the number of Representatives allotted to Arizona and Pennsylvania would remain unchanged. See U.S. Br. 18-19. No party before this Court is in a position to press for an adjustment using those figures, since California chose not to appeal the district court's judgment sustaining the Secretary's decision. See U.S. Br. 19 n.16, 30 n.23. Although governmental respondents that would obtain additional federal funds as a result of an adjustment may satisfy the injury-in-fact requirement for Article III standing (cf. Resp. Br. 63 n.27), they have no judicially enforceable right to an adjustment on that basis because (1) judicial review of the decennial census totals is not available under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (see *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2773-2776 (1992)); (2) those respondents have no constitutional claim of their own (*id.* at 2776); and (3) there is no reason to depart from the usual prudential rule against invoking the constitutional rights of a third party. See U.S. Br. 30 n.23.

affects the deference owed to his resolution of technical issues. The Secretary is directed to "take a decennial census of population * * * in such form and content as he may determine," 13 U.S.C. 141(a), and his authority to "determine" the "form and content" of the census necessarily encompasses the authority to evaluate scientific evidence bearing on the propriety of a statistical adjustment. Respondents cite no authority suggesting that the *curriculum vitae* of a particular agency head bears on the legal standard to be employed by a reviewing court. Cf. *Morgan* v. *United States*, 304 U.S. 1, 18 (1938) (it is "not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required"); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

B. Guideline One provided that the unadjusted census figures would "be considered the most accurate count of the population of the United States, at the national, State, and local level, unless an adjusted count is shown to be more accurate." Pet. App. 151.[9] Respondents

[9] The Secretary's final decision stated that "[a]n adjustment to the census is a fundamental change in the way we count and locate the persons residing in the United States." Pet. App. 150. Respondents point out (Br. 4-5) that statistical imputation techniques were used in the 1970 and 1980 censuses to estimate occupancy rates for housing units for which reliable information was unavailable. Respondents suggest (Br. 4) that the statistical adjustment proposed for the 1990 census is simply "another refinement" of an established practice. In fact, the proposed adjustment at issue here, which would have effected a change in the count for every occupied block in the country, is of a wholly different order of magnitude from the limited use of imputation techniques in prior censuses. When plaintiffs sought to compel a statistical adjustment to the 1980 census, the district court rejected a similar argument, concluding that "none of those adjustments in 1970 were even remotely similar to the types of wholesale adjustments presently suggested by the plaintiffs." *Cuomo* v. *Baldrige*, 674 F. Supp. 1089, 1107 (S.D.N.Y. 1987).

acknowledge (Br. 52) that the Secretary acted properly in giving precedence in his adjustment decision to distributive rather than numeric accuracy—that is, in focusing primarily on "getting the proportional distribution of the population right among geographical and political units" rather than on seeking the most accurate count of the total national population. Pet. App. 184; see U.S. Br. 14, 30-31. Respondents contend, however, that the Secretary employed an irrational approach in comparing the distributive accuracy of the adjusted and unadjusted figures. Specifically, respondents argue (Br. 55) that the Secretary (1) "focused on applications of the criterion of distributive accuracy that were unrelated to any use of census data," and (2) utilized an irrational methodology in comparing the distributive accuracy of the adjusted and unadjusted numbers at the state level.[10] Neither contention has merit.

[10] Respondents also state that the Secretary "regarded evidence of superior numeric accuracy as 'not relevant' to the determination of distributive accuracy" (Br. 39 (quoting Pet. App. 201)), a conclusion they characterize (Br. 52) as lying at the "determinative core" of the Secretary's decision. To begin with, respondents misconstrue the passage they quote, which states that "[w]hile the preponderance of the evidence leads me to believe that the total population at the national level falls between the census counts and the adjusted figures, that conclusion is not relevant to the determination of distributive accuracy." Pet. App. 201; see also *id.* at 147. The Secretary's statement that the unadjusted figures are too low and the adjusted figures too high obviously is not equivalent to a statement that adjustment would improve numeric accuracy. Indeed, the quoted passage was so non-determinative, and so peripheral, that respondents did not even mention it in their briefs in the court of appeals.

Although the passage quoted by respondents is not on point, it is doubtless true that the Secretary saw a real and substantial possibility

1. There is no basis for respondents' contention (Br. 55) that "the Secretary never considered analyses bearing on the superior accuracy of the adjusted counts for apportionment and districting." The Secretary emphasized that his focus on distributive rather than numeric accuracy was grounded in the constitutional purpose of the census, which is to apportion Representatives among the States, and in the other uses of the census,

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that a statistical adjustment could increase numeric accuracy while impairing distributive accuracy. Respondents suggest (Br. 39) that this conclusion was itself irrational, noting that "the Bureau has chosen to introduce innovations to maximize numeric accuracy because it has always recognized that improving numeric accuracy is the clearest way to improve distributive accuracy." Insofar as improved *enumeration* techniques are concerned, the two usually will go hand in hand. The enumeration process itself involves the identification of actual people and the places where they live: improvements in that process are therefore likely to provide a more accurate picture of the distribution of the population. There is, as the Secretary found, no similar basis for confidence that the statistical adjustment at issue here, which alters the population figures for every occupied block in the country based on a sample comprising less than 2% of the total population, will likewise improve distributive accuracy.

In our opening brief we state that "[e]ven a dramatic undercounting of the total population would not be inconsistent with the goal of fair apportionment if each State's share was accurately determined." U.S. Br. 30-31. Respondents dispute that proposition, offering a lengthy historical discursion that concludes (rather anticlimactically) with the observation (Br. 54 n.23) that "[o]nly under a method of apportionment such as the method of equal proportions (Hill method) is it true (and then only for congressional districts much larger than 30,000) that an evenly distributed undercount will not change the apportionment of Representatives." The method of equal proportions has been used for every apportionment from 1930 to the present, see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-452 (1992), and the average congressional district contains 572,466 persons, *id.* at 445. The government stands by the statement in its opening brief.

including intrastate redistricting and the distribution of federal funds. Pet. App. 141, 161, 184-185, 200-201. His ultimate conclusion was that "for the Constitutional purposes of the census the available evidence is consistent with the census counts being more accurate than the adjusted counts." *Id.* at 201. In theory, Guideline One might have led the Secretary to reject a proposed adjustment that was conceded to increase distributive accuracy at the state level if the Secretary had concluded that the unadjusted figures were superior at the local level. It is clear, however, that the Secretary's application of Guideline One did not in fact lead to that result. Rather, the Secretary stated that in his view "the census counts are the most accurate count of the population of the United States at the State and local levels." *Ibid.*[11]

2. In explaining that the superior distributive accuracy of the adjusted figures had not been demonstrated, the Secretary stated that, when realistic estimates of the relevant variances were used, the available evidence indicated that "the proportional shares of about 28 or 29 states would be worsened by an adjustment in terms of distributive accuracy." Pet. App. 191; see page 9, *supra*.

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[11] Respondents chide the Secretary (Br. 40) for "cit[ing] the results of a Bureau loss function analysis of distributive accuracy for the 23 cities in metropolitan areas of 500,000 or more." To suggest that this passing reference was the "focus" of the Secretary's decision-making process (see *ibid.*) misreads the decision. In any event, although the question whether the adjusted or unadjusted numbers more accurately estimate Chicago's population vis-a-vis that of Los Angeles (see *ibid.*) is not dispositive of any representation or funding decision, it is surely *relevant* to assessing the reliability of the adjustment mechanism. For example, both the Undercount Steering Committee and Census Bureau Director Bryant attached some significance to their view that adjustment would generally improve proportional accuracy for places with a population of over 100,000. See DX 1, at 903; J.A. 81.

In respondents' view (Br. 41), the Secretary thereby "disregarded the sizes of errors," permitting "large gains in accuracy (with significant practical consequences) [to] be offset by small losses in accuracy (with little or no practical significance)." Contrary to that contention, however, determining the most appropriate measure of accuracy in these complex circumstances, and the best manner in which to weigh the respective (and competing) equities of the several States, requires exercise of precisely the sort of judgment that is entrusted to Congress and the Secretary under the pertinent constitutional and statutory provisions. It was, at the very least, "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2777 (1992), for the Secretary to attach significance to the prospect that the relative shares of a majority of States would actually be made less accurate by an adjustment. As respondents point out (Br. 42), Dr. Freedman testified at trial that, although the counting of States in that manner "does give you some information," he did not think it "is such a good way" to measure distributive accuracy. See Tr. 2445.[12] But both the Undercount Steering Committee

[12] Contrary to respondents' contention (see Br. 42, 54, 67), the government did not "conced[e]" in the court of appeals that the Secretary's reliance on the number of States whose proportional shares would be worsened was not "valid." In its brief below, the government simply noted (at 47 n.16) the testimony of Dr. Freedman that we quote here, while also noting that the technique was used by the Undercount Steering Committee, Census Bureau Director Bryant, and the Secretary. Similarly without merit is respondents' contention (see Br. 42, 55) that the Secretary's methodology was denounced by the Secretary's own expert witness (Dr. Freedman) as "borderline unreasonable." At trial, Dr. Freedman was presented with a hypothetical situation in which the actual population of each of five States was known, and in which the proportional shares of two of the States would be made substantially more accurate by adjustment, while the shares of the other three would be made marginally less accurate. Tr. 2507. In response to a question whether a decision against adjustment in that situation would be "borderline unreasonable" (albeit without stating on "which side of the border" the decision would fall), Dr. Freedman answered: "That's fair." *Ibid.* Dr. Freedman did not regard the hypothetical example as functionally equivalent to the decision actually faced by the Secretary; to the contrary, he characterized the hypothetical as "unrealistic" in significant respects. Tr. 2507, 2540. Dr. Freedman never characterized the Secretary's approach to the problem actually at hand as "borderline unreasonable." Although he acknowledged that the Secretary had "made some mistakes, as anyone would," Tr. 2356, he agreed that the Secretary had considered the relevant questions "in a rational way," *ibid.*; see also Tr. 2380, and he agreed with the Secretary's ultimate conclusion that "[t]here is certainly not sufficient evidence to reject the distributive accuracy of the census counts in favor of the adjusted counts," Tr. 2358.

and the Census Bureau Director based their recommendations in favor of adjustment in substantial measure on their belief that adjustment would render more accurate the proportional shares of a majority of States. See DX 1, at 903, 913; J.A. 81. The Secretary can hardly be faulted for attaching significance to the same comparison.

C. Contrary to respondents' contention (Br. 57-58), the justifications for deference to an agency's technical and policy determinations—the superior expertise and resources of agency officials, and respect for the decision of Congress to assign a particular matter to an administrative body—are fully applicable to the adjudication of constitutional questions.[13] There is no general rule that

[13] Respondents seek (Br. 57) to distinguish this Court's prior decisions requiring judicial deference to an agency's technical decisions, on the ground that those cases were brought under statutes authorizing only limited judicial review. However, the Census Act's authorization to the Secretary to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. 141(a), is a broad and open-ended delegation that, as a general rule, would foreclose judicial

federal courts must resolve de novo all issues bearing on the ultimate disposition of a constitutional claim. To the contrary, federal courts adjudicating constitutional issues frequently defer (or accord a presumption of correctness) to subsidiary determinations made by actors better positioned to resolve particular questions. *E.g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2471 (1994) (opinion of Kennedy, J.); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49-50 (1938) (NLRB's factual findings concerning jurisdiction over employer under Commerce Clause reviewable to determine whether supported by "adequate evidence"); cf. *FPC* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575, 586 (1942) ("The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas.").[14] Moreover, appellate courts, including this Court, regularly defer to the factual findings of federal district courts even where those findings are determinative of a constitutional claim. See, *e.g.*, *Maine* v. *Taylor*, 477 U.S. 131, 144-145 (1986).

In this case, judicial deference is required by the text of the Constitution. The provision centrally relevant to this case states that the "actual Enumeration" shall be made "in such Manner as [Congress] shall by Law

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review altogether. See 5 U.S.C. 701(a)(2) (judicial review barred where matter "is committed to agency discretion by law"); see U.S. Br. at 18-27, *Franklin* v. *Massachusetts* (No. 91-1502).

[14] See also *Jackson* v. *Virginia*, 443 U.S. 307, 318-319 (1979) (although Constitution requires that criminal conviction be based on proof beyond a reasonable doubt, question for reviewing court is not whether court believes that proof was sufficient, but whether any reasonable jury could conclude that applicable evidentiary standard was met); *Thompson* v. *Keohane*, 116 S. Ct. 457, 463-465 (1995) (federal court adjudicating habeas corpus application must accord presumption of correctness to state court findings of fact).

direct." Art. I, § 2, Cl. 3. The fact that population figures are used to apportion Representatives among the States (and thus indirectly affect voting) does not permit a court to second-guess the "Manner" in which Congress (through the Secretary) has conducted the census.

D. As we explain in our opening brief (at 45), establishment of an equal protection violation based upon racial discrimination requires proof of a discriminatory purpose. *Washington* v. *Davis*, 426 U.S. 229, 239-245 (1976).[15] Contrary to respondents' suggestion (Br. 70), we do not contend that a showing of intentional racial discrimination is a necessary predicate of *every* equal protection claim. Without showing intentional racial discrimination, a plaintiff challenging a State's districting decisions may prevail by showing that differences between the populations of individual districts within the State are "not the product of a good-faith effort to achieve population equality" as nearly as practicable,

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[15] Respondents do not contend that Secretary Mosbacher's 1991 decision was tainted by intentional racial discrimination. But respondents do hint at a nefarious motive for the Commerce Department's initial 1987 decision against adjustment; they rely on a May 1987 intradepartmental memorandum that listed "adjustment problems" and predicted that "States with large minority populations would benefit from an adjustment and states with small minority populations would lose." Resp. Br. 21 (quoting PX 574, attached memorandum at 1). Read as a whole, however, the memorandum clearly did not suggest that the expected benefit to States with high minority populations was itself a "problem." The point instead was simply that an adjustment would have predictable winners and losers, and that "[n]o matter which party is in power, it is quite likely that there will be those who will charge the Bureau or the Department with fraudulent motives for adjusting the counts." PX 574, attached memorandum at 3. As matters developed, the correlation between a State's minority population and its gain or loss from adjustment was far less clear than the 1987 memorandum anticipated. See note 17, *infra*.

unless the State demonstrates that "the population deviations in its plan were necessary to achieve some legitimate state objective." *Karcher*, 462 U.S. at 740. The significant differences between apportionment of Representatives among the States and the process of intrastate districting counsel against mechanical application of the *Karcher* framework here. Even assuming that the *Karcher* analysis applies by analogy, however, the Secretary clearly made a good-faith effort to maximize equality of representation (*i.e.*, distributive accuracy) as nearly as practicable. See U.S. Br. 39-45.[16]

E. Respondents seek to prevail without showing *either* a discriminatory motive *or* unnecessary deviations between the size of districts in different States. They contend (Br. 71) that even if "the Secretary was genuinely in doubt about the comparative accuracy of the two counts or found the two counts equally erroneous, his choice of the count in which inaccuracy is systematically concentrated among minorities instead of the count in which inaccuracy is non-systematically distributed throughout the population would warrant strict scrutiny." Respondents' disparate impact claim is incon-

[16] Under *Karcher*, the Secretary could be found not to have made a good-faith effort to maximize equality of representation only if (1) the Secretary had determined that the adjusted figures would increase distributive accuracy but had nevertheless declined to make an adjustment (see U.S. Br. 43), or (2) the Secretary's determination that the adjusted figures had not been shown to be more accurate was irrational (see *id.* at 45). For the reasons stated in text and in our opening brief, neither of those propositions is sustainable. Respondents attempt to establish the lack of a good-faith effort by impeaching the integrity of Secretary Mosbacher, contending (Br. 70) that the Secretary's actions evinced an unwillingness to give serious consideration to adjustment. The district court correctly and emphatically rejected a similar argument. See Pet. App. 62-63 n.16.

sistent with this Court's precedents and is unsupported by the record.

1. This Court has previously considered equal protection challenges to electoral devices, such as multimember districting and at-large voting systems, that do not create districts of unequal size but that are alleged to have an adverse effect on voters of a particular race. The Court has "required plaintiffs to demonstrate that the challenged practice has the *purpose* and effect of diluting a racial group's voting strength." *Shaw* v. *Reno*, 113 S. Ct. 2816, 2828 (1993) (emphasis added) (citing cases); see also, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 618-619 (1982). The requirement that plaintiffs demonstrate discriminatory intent "is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause." *Id.* at 619 (quoting *Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion)). The legal standard announced in *Washington* v. *Davis* is thus applicable to controversies bearing on the right to vote.

2. In any event, respondents failed at trial to show that the decision against adjustment had an adverse effect upon the electoral power of minority voters. The constitutional purpose of the census is to apportion Representatives among the States, not to allocate representation or financial benefits among racial or other demographic groups. The decision against adjustment therefore harms minority residents only to the extent that States with disproportionately high minority populations would have been credited with higher shares of the country's population if the proposed adjustment had been made. As we note in our opening brief (Br. 48-49), however, respondents made no comprehensive effort at trial to demonstrate that this was so. Thus, even if a disparate impact upon minority residents furnished a basis for a

constitutional challenge, respondents have failed to offer the requisite proof.[17]

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded with directions to enter judgment for petitioners.

DREW S. DAYS, III
Solicitor General

DECEMBER 1995

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[17] Respondents state (Br. 26) that "undercounting was concentrated in areas where minorities are concentrated—in California, Texas, Florida and other states of the Southwest and South and in major cities across the country." California, Texas, and Florida do have high minority populations, see Bureau of the Census, Department of Commerce, *State and Metropolitan Area Data Book 1991*, at XIV-XV (4th ed. 1991) (*Data Book*), and all three States would have been credited with larger shares of the country's population if adjusted figures had been used. See A.R., App. 10, Table 5. On the other hand, States such as Illinois, New Jersey, and New York also have large minority populations, see *Data Book*, at XIV-XV, and all three would have lost population share if the proposed adjustment had been made. See A.R., App. 10, Table 5. Respondents assert (Br. 27) that higher than average undercounts also occurred in northeastern cities such as New York, Chicago, Detroit, Baltimore, and Washington, D.C. They fail to note, however, that the States in which four of those five cities are located—New York, Illinois, Michigan, and Maryland—would lose population share under the proposed adjustment. See A.R., App. 10, Table 5. Two experts have determined, in fact, that "[u]rban blacks have an undercount three times that of the rest of the population, according to the PES; but 55% of them live in states that would lose population share if the adjustment were implemented." D. Freedman & K. Wachter, *Rejoinder*, 9 Stat. Sci. 527, 537 (1994).